# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Laas v. Morrison,*
2024 BCSC 191

Date: 20240207
Docket: S57811
Registry: Vernon

Between:

**Corey Edward Laas and Angela Christine Laas**

Plaintiffs

And

**Merle Thomas Morrison**

Defendant

Before: The Honourable Justice Betton

## Reasons for Judgment
## Re Costs

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|---|---|
| Counsel for the Plaintiffs: | K. Burnham |
| Counsel for the Defendant: | M.S. Dugas |
| Written Submissions Received: | January 15 and 22, 2024 |
| Place and Date of Judgment: | Vernon, B.C.<br>February 7, 2024 |

## Introduction

[1] The parties seek a determination of costs following my decision on the substantive issues in this civil case. That decision is not published but indexed at 2023 BCSC 2130.

## Background

[2] The matter proceeded by way of summary trial. In those reasons I described the case in these terms:

> [1] In this summary trial the plaintiffs seek orders in relation to an easement over the defendant's property. Their stated objective is to address ongoing conflict associated to the location and their use of the easement that provides them with access to their residence.

[3] The conflict between the defendant and the owners of the property currently owned by the plaintiffs here was not new. The previous owners were engaged in litigation with the defendant where the easement was a prominent consideration. The trial was heard by Justice Dley. His decision (2012 BCSC 669) was appealed by Mr. Morrison. In my decision, I referred to those earlier decisions, including the following:

> [10] Justice Dley did state that easement "conformed to the road" that had always been used, and is the road that continues to be used. He concluded that there was a lawful easement and ordered Mr. Morrison to remove all obstacles and refrain from interfering with the access.
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> …
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> [14] The Court of Appeal's conclusions with respect to the easement include the following:
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> > [26] The trial judge must be taken to have approached his conclusions on the basis that he could not rely on the Lewall Plan to locate the easement. It will be recalled that even Mr. Sansom did not defend his own plan. Quite apart from the problem with its measurements, the easement as shown on the Lewall Plan does not line up with the private crossing of the railway tracks.
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> > . . .
> >
> > [28] I accept the respondents' submission that the intention of the owners was to create an easement entering Lot B from the private crossing, running to the lakeshore and turning along the lakeshore towards Lot C. In the absence of any reliable evidence that the land area had shrunk by erosion, the best evidence of the location of the

> easement is the road which has always been used to reach Lot C. Within the hierarchy of evidence, the course travelled by the owners from the time of the subdivision is evidence of fences or possession reasonably related to the time of the original survey. Certainly, "measurements", in this case, are of little or no probative value.
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> [29] In my view, the trial judge was entitled to find that there was a lawful easement in place, to locate it as he did, and to conclude that Mr. Morrison had blocked it.
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> [15] Those statements from the Court of Appeal are the most specific descriptions as to the actual placement of the easement. The location shown on the plan currently registered as the reference plan associated to the easement, referenced above, is, therefore, incorrect. It is based on measurements which were found by the trial judge, and confirmed by court of appeal, to be incorrect.

[4] The Court of Appeal's decision is indexed at 2013 BCCA 48.

[5] The issues that arose following that decision are described to some degree in my decision and I will not repeat that here.

[6] The specific issues at the summary trial are described in my reasons for judgment as follows:

> [28] The notice of civil claim seeks a finding that the defendant is in contempt of the order of Justice Dley from February 10, 2012; that he remove all obstructions of the easement supported by a police enforcement clause; an order that he remove signage suggesting the easement does not exist; damages for nuisance, trespass and slander of title; punitive damages; an order that references plan of the easement in accordance with Mr. Minifie's opinion replace the existing reference plan of easement; and costs.
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> [29] In the notice of application and through the course of hearing, the plaintiffs abandoned their application for finding a of contempt and their claims in trespass and slander of title.
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> [30] The plaintiffs say the conduct of Mr. Morrison following the decision of the Court of Appeal both before and after their purchase of the property in 2021 shows that the Court of Appeal's decision in relation to the location of the easement needs to be formalized in a registered reference plan on the title of the defendant's property.
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> [31] In addition, they say that the historical conduct of the defendant together with his affidavit material support the other claims for relief.

[7] Ultimately I was required to determine the request for modification and whether the tort of nuisance had been proved by the plaintiffs.

[8] My conclusions on those issues include the following:

> [46] Despite the Court of Appeal's conclusion, it is apparent from the defendant's conduct and his own affidavit material filed on this application, that he does not accept the conclusion of the Court of Appeal. . . .
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> …
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> [49] From a purely practical perspective, the circumstances that currently exist make it desirable to remove any question as to where the easement is located on the defendant's property. The defendant, in part, justifies his position on the inability of the plaintiffs to present a plan of the easement. In his affidavit at para. 32 he states:
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> > 32. Whenever the Plaintiffs and I would speak about the easement, I would ask them to show me the plan that showed the easement, or to come up with a plan, but no plan was produced to resolve the issues I raised.
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> [50] It is apparent the defendant simply rejects the Court of Appeal's decision, and to the extent that the absence of an accurate plan included in the registered easement is used by the defendant as a basis to avoid the consequences of the Court of Appeal's decision, removing that uncertainty or that rational for avoidance is desirable.
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> …
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> [72] Even if I were to accept the plaintiffs' version of these events I am unable to say that they meet the threshold for proving a private nuisance.
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> [73] While no doubt frustrating, unsettling and even frightening, neighbour disputes do not equate to nuisance. The tort of nuisance is directly linked to interference with property and that interference must be substantial. Here the actual interference with property is limited to the placement of the concrete blocks. That was short lived even if requiring the intervention of police.

[9] In relation to the conduct of the litigation, my reasons also reference some delays in the filing of response material by the defendant and the defendant's acquisition of an expert report. Those are summarized as follows in paras. 22 and 23 of my decision:

> [22] That incident resulted in the in this litigation being commenced on July 15, 2023. There was a delay in the filing of any response by Mr. Morrison. In exchange for extensions of time to file that response conditions were attached, to which Mr. Morrison agreed. They were confirmed in writing by Mr. Morrison as follows:
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> > 1. The extension of time is without prejudice to any remedies for either party and will not be used as a defence;
> >
> > 2. The concrete blocks will remain off the travelled area of the current access to the property;

> 3. I will immediately remove the "no trespassing" and warning signs;
>
> 4. I will not photograph or interfere with your clients' guests, invitees or delivery people; and
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> 5. I provide this letter to you as my written commitment to the above, and I have arranged to have this letter emailed to you directly before 5 pm today (Thursday, August 11, 2022).

[23] Thereafter each party retained and served and filed reports of surveyors as expert reports. The defence report was subject to terms of an order made by Mr. Justice Hori in March 21, 2023. The relevant terms of that order are as follows:

> 2. The survey commissioned on behalf of the Defendant, Merle Thomas Morrison, will be conducted in accordance with the findings made and confirmed by the Court of Appeal in the case of Morrison v. Van Den Tillaart, 2013 BCCA 48 and the surveyor is not to stray and create new boundaries that do not fit within the description of the easement set out in the Court of appeal decision.
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> 3. Between now and the time that the summary trial application is decided, the Defendant, Merle Thomas Morrison, shall not obstruct vehicular traffic accessing the Plaintiffs' property.

[10] Following the release of my decision, the parties were invited to make submissions as to costs. I received those in writing.

## Positions of the Parties

[11] The plaintiffs' general position is summarized in para. 1 of their written submissions as follows:

> 1. The Plaintiffs seek an order for special costs on an indemnity basis, because the issue of their access had been previously settled by the courts in the Morrison v Van den Tillaart action/appeal (the "Van den Tillaart action"). They should not have had to incur these costs or bring this action had Mr. Morrison [accepted] and adhered to the courts determination in the Van den Tillaart action. Alternatively, the Plaintiffs seek an order for costs because they were successful on the main issue in the litigation.

[12] They identify as the main issue, and "the only issue that mattered", as being varying the easement in accordance with the plan outlined by their expert witness.

[13] In relation to the conduct of the litigation, the plaintiffs point out that they had communicated to Mr. Morrison warning of the dangers of attempting to relitigate

matters that had already been determined by the courts and the shortcomings in their defence expert report.

[14] They say that the defendant's expert report clearly did not comply with Justice Hori's order and, despite that, they relied on it at the summary trial.

[15] They argue that the defendant's report and his position at the summary trial was essentially founded on a rejection of the decisions of Justice Dley and the Court of Appeal. That forced the plaintiffs to continue the litigation.

[16] Finally, they assert that the defendant delayed and frustrated the process of bringing the matters to a resolution.

[17] On the strength of all of this, the plaintiffs argue that they are entitled to special costs.

[18] The defendant stressed that the plaintiffs abandoned a number of claims and failed to succeed on the nuisance claim that was proceeded with, resulting in the only success being in relation to the location of the easement area. On this basis, the defendant argues that he was the party who was substantially successful.

[19] The defendant stresses that he had to prepare to defend all aspects of the claims until they were abandoned either on the eve of or during the course of the hearing.

[20] In relation to delay, he says there is absence of evidence that it was a calculated effort and insufficient in quantum to "attract any condemnation".

[21] He argues that the expert simply prepared an independent assessment and the fact that it was deemed unsatisfactory by the Court is not a basis for penalization in costs.

[22] He argues that the various claims either dismissed or abandoned reveal that the plaintiffs' intention was to punish the defendant and that it is the defendant that should receive his costs on a special cost basis.

## Analysis

### Substantial Success

[23] The dispute underlying the whole of the litigation was the precise placement of the easement. The context of the matters before Justice Dley and the Court of Appeal resulted in the precise placement of the easement only being set out as set out above. That articulation makes it clear the location is different than the plan that was registered against the title.

[24] As observed in my decision, it is apparent that the defendant did not accept the conclusion of the Court of Appeal and it was that conduct which formed the basis for the various claims of contempt and tortious conduct advanced in the notice of civil claim.

[25] The conduct which was the basis for the tort claims was also relevant to establishing the basis for the order made.

[26] It is my conclusion that the central issue in the litigation and that which consumed the majority of the time was indeed the placement and location of the easement. When viewed as a whole, and despite having abandoned some of its claims and not succeeded on the nuisance claim, the plaintiffs were substantially successful.

### Special Costs

[27] There is not a meaningful dispute between the parties as to the law regarding special costs. Numerous authorities were cited by the parties in their submissions. I will reference only one of those. In *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177 the Court stated as follows at para. 134: “Special costs should be reserved to punish and deter reprehensible conduct in the course of litigation. Pre-litigation conduct should not be considered in determining whether such an award is appropriate.”

[28] Subsequent to my receipt of the parties’ written submissions the Court of Appeal released its decision in *Vassilaki v. Vassilakakis*. 2024 BCCA 15. In addition

to referencing the general concept that special costs may be awarded when a party is engaged and represent reprehensible conduct during the course of litigation, it refers to the possibility that special costs can be awarded on the basis of a party pursuing a claim that they should have known was “manifestly deficient”, a logic that would extend, of course, to the converse example in the defence of claims. In *Vassilaki* the Court clearly restrains the application of that foundation for special costs. The decision states as follows at paras. 48 and 49:

> [48] In my view, something more is required than a meritless case that the plaintiff ought to have recognized was deficient. In *Webber BCCA*, this Court recognized that “carelessness or indifference with respect to the facts on which they have advanced unmeritorious positions with serious repercussions” could be characterized as reprehensible conduct, but not, with the benefit of legal advice, taking a position that proved not to be sound. In Malik, this Court endorsed the appropriateness of an award of special costs “where a party pursues a meritless claim and is reckless with regard to the truth”: Malik at para. 31, emphasis added [by Court of Appeal].
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> [49] Justice Saunders explained the need for an “extra element” to support a special costs award against a party whose claim has failed on the merits in *Berthin v. British Columbia (Registrar of Land Titles)*, 2017 BCCA 181:
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> > [53] In rare circumstances an entirely meritless claim may attract special costs as observed in *McLean v. Gonzales-Calvo*, 2007 BCSC 648, but those circumstances invariably have an extra element, for example, a case that was utterly without hope so as to amount to misconduct or an abuse of process. In circumstances of an extant appeal which, if successful, would support the litigant, and where the result may seem clear in hindsight but was not so clear as to attract extra costs from this court, I consider special costs as a sanction for lack of merit generally are to be eschewed for their potential to chill members of the community from solving disputes in the forum designed for that very purpose. This is an access to justice and openness of the court processes issue.

[29] In respect of the delays, it should be noted that plaintiff accommodated some of those delays and extracted certain agreements or understandings in exchange for them. Reasonable parties and good counsel frequently reach such understandings and are encouraged to do so. When and whether they do so is a matter of judgment and reflection in all of the circumstances, but it is not an obligation. The plaintiffs could have chosen not to do so here.

[30] The result of the trial before Justice Dley and the Court of Appeal did not invite the type of order sought here to alter the plan registered with the Land Title Office depicting this precise location of the easement. The fact that the defendant, at least indirectly, relied on the absence of the precise depiction is indeed unfortunate.

[31] The order of Justice Hori which was clearly intended to ensure that expert evidence was directed at resolving any basis for dispute about what Dley J. and the Court of Appeal had ruled. Despite that the defence expert did not adhere to the terms of that order. The defendant had to recognize that and cannot rely on the simple assertion that “this is what the expert gave us”. It was the defence that chose to rely on the expert report.

[32] While I do not condone the defendant’s actions, the result is that the plaintiffs succeeded and the additional step of having a detail plan registered has now been ordered.

[33] Having regard to the whole of the circumstances and considering the issues that were advanced, those that were not, and the success that was had, and that which was not, it is my conclusion that this is not a case where an order for special costs is warranted.

“Betton J.”